

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF TENNESSEE**

JONES, et al.

Plaintiffs,

v.

VARSITY BRANDS, LLC, et al.,

Defendants.

**Case No. 2:20-cv-02892-SHL-tmp**

**NOTICE OF SUPPLEMENTAL AUTHORITY**

Defendants hereby submit the attached supplemental authority in further support of their opposition to Plaintiffs’ motion for class certification (ECF No. 420), Defendants’ motion for summary judgment (ECF No. 466), and Defendants’ motions to exclude testimony of Dr. Maki (ECF No. 391, 458). The submitted authority are two recent orders of Judge Donato in *In re Google Play Store Antitrust Litigation*, MDL Case No. 21-md-02981-JD (N.D. Cal. Aug. 28, 2023).

In the first (ECF No. 588, attached as Exhibit A hereto), the Court held that the passthrough opinions offered in that case by Hal Singer,<sup>1</sup> although based on mathematical modeling and Dr. Singer's economic reasoning, were inadmissible under Rule 702 of the Federal Rules of Evidence.

In the second (ECF No. 589, attached as Exhibit B hereto), the Court concluded that its previous certification of a class of indirect purchasers in the case, based on Dr. Singer's now-excluded opinions, “should be vacated.” (Because the Ninth Circuit had accepted the prior order for interlocutory appeal, however, the District Court concluded it lacked jurisdiction to do so.)

The issue of passthrough—and Plaintiffs’ failure to provide admissible evidence of passthrough due to the complete lack of analysis, much less sufficient analysis, by their expert Dr. Maki—is central to class certification and summary judgment in this case as well. (*See, e.g.*, ECF No. 420 at PageID 13751-53; ECF No. 471 at 22-23, 33, 46-47; ECF No. 391-1 at PageID 12796-803; ECF No. 446 at PageID 16790-92.) As the supplemental authority further confirms, *ipse dixit* assertions of an expert on the passthrough issue and, indeed, even mathematical modeling (which Dr. Maki did not even attempt to undertake) that is flawed do not suffice for a

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<sup>1</sup> The plaintiffs in the related *Fusion Elite* case put Dr. Singer forward as a potential expert.

plaintiff to sustain its burden on passthrough, which is an all-critical issue for class certification in indirect purchaser cases.

Dated: September 8, 2023

Respectfully submitted,

s/ Matthew S. Mulqueen

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